ABSOLUTE IMMUNITY IN DEFAMATION: LEGISLATIVE AND EXECUTIVE PROCEEDINGS.

I. Legislative Proceedings.

Freedom of speech is inherent in the idea of a deliberative assembly. Speech is the element which gives life and power of action to such a body, as air does to the natural body. And the free and fearless discussion of every plan and purpose, which is essential to wise legislation, would be impossible if members were subjected to the restraints imposed by law with respect to private reputation. The essential nature of such immunity is shown by the fact that it has followed parliamentary government in its progress throughout the world.[1] But here, as elsewhere, freedom

[1] "No member of either chamber shall be prosecuted or held responsible on account of any opinion expressed or votes cast by him in the performance of his duties" (France, Const. Law on the Relations of Public Powers, 1875, Art. 13); "No member of the Reichstag shall at any time suffer legal or disciplinary prosecution on account of his vote, or on account of utterances made while in the performance of his functions, or be held responsible in any other way outside of the Reichstag" (German Empire, Const. 1871, Art. 30); "The members of the States-General shall not be liable to judicial prosecution for anything which they may have said in its sessions or which they may have presented to it in writing" (Netherlands, Const. as amended 1887, Art. 97); "No member of either house shall be arrested or prosecuted on account of opinions expressed or votes cast by him in the performance of his duties" (Belgium, Const. 1831, Art. 44); "Representatives in the Storthing shall not be held responsible outside of the Storthing for opinions expressed therein" (Norway, Const. 1814, Art. 66); "Senators and deputies shall not be called to account for opinions expressed or votes given in the houses" (Italy, Const. 1848, Art. 51); "Members of the Reichsrat shall not be held responsible on account of any vote given, and for any utterances made by them in the exercise of their office they may be held responsible only by the house to which they belong" (Austria, Fundamental Law, 1867, Sec. 16); "No member of the Riksdag shall be prosecuted or arrested on account of his actions or utterances in that body unless the house to which he belongs has authorized such prosecution or arrest by special resolution adopted by at least a five-sixth vote" (Sweden, Const. 1809, Art. 110); "Senators and deputies are inviolable for their opinions and votes in the exercise of their functions" (Spain, Const. 1876, Art. 46; Portugal, Const. 1826, Art. 25; Mexico, Const. 1857, as amended 1874, Art. 59; Brazil, Const. 1891, Art. 19; Chile, Const. 1833, Art. 12); "No member of either house shall be held responsible outside the respective houses for any opinion uttered or for any vote given in the house. When, however, a member himself has given publicity to his opinions by public speech, or documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law" (Japan, Const. 1899, Art. 52). Translations from Dodd's Modern Constitutions. Referring to the further protection of members from insult, in Germany and France, Dr. Burgess observes: "This is carrying the privilege of members too far. If representatives may say anything they will against private character in the chambers, without fear of prosecution under the law of libel and slander, it seems to me only fair that other persons should be allowed to say anything they will about the representatives under the restrictions imposed by that law." Polit. Science and Const. Law ii, 122.

of speech is to be distinguished from unrestrained license. There must be rules before speech becomes debate, and parliamentary bodies, like courts, have the power to regulate their proceedings and to discipline members for abuse of their privileges.[2]

In England this immunity, which was at a very early day based upon the custom of Parliament, has had a long and interesting history.[3] It received formal legislative and judicial sanction as early as 1399, with respect to executive,[4] and in 1512 with respect to judicial[5] aggression, and in 1541 it appears among the "ancient and undoubted rights and privileges" claimed by the Speaker of the House of Commons at the beginning of each Parliament.[6] The Tudor and Stuart kings strove, nevertheless, to limit both freedom of speech and matter of deliberation in Parliament; the Commons had to struggle not merely for latitude of discussion, but for their initiative in legislation. The Crown maintained, and the House denied, that the Commons were summoned merely to vote such sums as were asked of them, to formulate or approve legislation submitted to them, or to give opinions on matters of policy in which they were consulted. A standing protest against the Crown's contention survives in the practice, at the beginning of every session, of reading a bill for the first time before the king's speech is considered.[7] Throughout this period members

[2]See, generally, Redlich, Procedure of the House of Commons, and Hinds' Precedents of the House of Representatives.

[3]The need of protection against arbitrary domination is shown by the conduct of Edward I towards Henry Keighley, the spokesman of the Commons in the Parliament of Lincoln; of John of Gaunt towards Peter de la Mare, the prolocutor of the Good Parliament, and of the Yorkish party towards the Lancastrian Speaker, Thomas Thorpe, in 1453. Stubbs, Const. Hist. § 451.

[4]This arose out of the condemnation of Sir Thomas Haxey by Richard II in 1397, for the introduction of a bill for the reduction of the charges of the royal household. Rot. Parl. iii, 339-341; Taswell-Langmead, Const. Hist. 242-244. Two years later, in the first year of the reign of Richard's successor, the judgment against Haxey was twice reversed and annulled as being *"encontre droit et le curse avoit este devant en Parlement"*—in the first instance, upon his own petition by the King and Lords, and, again, on the petition of the Commons. Rot. Parl. iii, 430, 434. The immunity was thus acknowledged by the highest authorities of the realm.

[5]In the case of Richard Strode, who was prosecuted in the Stannary Court, in 1512, for the introduction of certain bills for the regulation of tin mines in Cornwall. Anson, Law of the Const. 1, 147; Taswell-Langmead, Const. Hist. 257. This proceeding gave rise to an Act condemning as void, in the case of Strode "and of all members of the present and future Parliament," legal proceedings "for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament, to be communed or treated of." 4 Hen. VIII, c. 8.

[6]May, Parl. Prac. [120].

[7]Anson, Law of the Const., Parl., 151.

whose speech, in matter or in manner, was obnoxious to the court were summoned before the Council and committed to prison, or forbidden to attend Parliament until further notice. In 1571 Elizabeth forbade the Commons to meddle with any matters of state except such as were propounded to them. Replying, in 1593, to the Speaker's petition for the usual privileges, she said: "Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth, or what cometh in his brain to utter that; but your privilege is, aye or no."[8] In indignation at such attempts to gag the House, Wentworth asked in the Parliament of 1587 "whether this council was not a place for any member of the same, freely and without control, by bill or speech, to utter any of the griefs of the commonwealth."[9] The contest culminated under James I in the famous Protestation of the Commons, December 18, 1621. To James' assertion, in connection with the imprisonment of Sir Edward Sandys, that he felt himself "very free and able to punish any man's misdemeanors in Parliament, as well during their sitting as after," the Commons replied in a petition claiming freedom of speech as their ancient and undoubted right and inheritance. The King's rejoinder was that these privileges were derived from the grace and permission of his ancestors and himself, since most of them had grown from precedents which showed rather toleration than an inheritance. The Commons thereupon promulgated their Protestation. James dissolved Parliament, tore the Protestation from the journals of the House, and meted out various punishments to the chief offenders.[10] The last instance of a direct violation of the privilege was the imprisonment of Sir John Eliot and eight other members in 1629 for seditious speeches in Parliament. Eliot and his associates successfully resisted the jurisdiction of the Star Chamber; but in the Court of King's Bench, to which the case was transferred, judgment was rendered against them, after a ruling by the judges that the Act of 1512 was a private Act referring to Strode's case only.[11] In

[8]Prothero, Stat. and Const. Doc. 119, 125.

[9]*Ibid.* 123. In 1571 Strickland, who had introduced a bill for reforming the Book of Common Prayer, was forbidden to attend Parliament. Prothero, 119. Cope was committed to the Tower in 1587 for suggesting ecclesiastical reforms; and Wentworth was imprisoned three times between 1576 and 1593 for persisting in discussing subjects unacceptable to Elizabeth. D'Ewes, 166, 410; Medley, Const. Hist. 270.

[10]Prothero, 313, 314; Gardiner, Hist. of England 261.

[11]Gardiner, Hist. of England, vii, 90-96, 108-119; Forster, Eliot, ii, 459 *et seq.;* Hallam, Const. Hist., i, 412 *et seq.*

1641, however, the Long Parliament declared the proceedings in Eliot's case to have been a breach of the privileges of the House, and in 1667 the judgment of the Court of King's Bench was formally reversed by the House of Lords on a writ of error.[12] At the same session the Commons resolved that the statute of 1512 was of general operation, "a declaratory law of the ancient and necessary rights and privileges of Parliament." The principle embodied in the claim thus formally recognized appears very early in the report of the conference of 1667:

"No man can make a doubt but whatever is once enacted is lawful; but nothing can come into an act of Parliament but it must first be affirmed or propounded by somebody; so that if the act can wrong nobody, no more can the first propounding; the members must be as free as the Houses. An act of Parliament cannot disturb the state; therefore the debate that tends to it cannot, for it must be propounded and debated before it can be enacted." [13]

The immunity was finally embodied in the provision of the Bill of Rights "that the freedom and debates on proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." [14]

In this country freedom of legislative discussion has been quite uniformly protected by constitutional enactments.[15] The usual provision is that for any speech or debate in either House a member shall not be questioned elsewhere; in many constitutions the language is that speech in the legislature can be the foundation of no prosecution or action, civil or criminal, in any other court or place. The provisions are usually confined to speech and debate, although

[12]Lords' Journal, xii, 223.

[13]*Ibid.* 166.

[14]1 Wm. & M., sess. 2, c. 2. On this subject in general see also May. Parl. Prac. 96 *et seq.*, and Redlich, Procedure of House of Commons, III, 42 *et seq.* The provision of the Bill of Rights is obviously declaratory. Fielding *v.* Thomas [1896] A. C. 600. The immunities enjoyed by representatives in Canada and Australia are such as do not exceed those enjoyed by the Commons House of Parliament of the United Kingdom. British North America Act, 1867, as amended by The Parliament of Canada Act, 1875, sec. 18; Commonwealth of Australia Const. Act, 1900, Art. 49.

[15]Some of the colonial charters contained such provisions, and the articles of Confederation, Art. V, par. 5, provided that "freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress." At the present day the only state constitutions which omit specific provision for this immunity are those of California, Florida, Iowa, Mississippi, Nevada, North Carolina and South Carolina.

occasionally the broader term deliberation is used.[16] There is probably no essential difference in the various provisions,[17] which have been construed to cover votes, reports and other official acts, as well as debates.[18]

The only important judicial discussion of legislative immunity is the opinion of Chief Justice Parsons in the case of *Coffin* v. *Coffin*, in 1808.[19] As defined in that case the privilege is not so much

[16]The commonest form is that used in the federal Constitution: "For any speech or debate in either House they shall not be questioned in any other place." U. S. Const., Art. I, sec. 6. A broader form is used in the Massachusetts Constitution: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Art. 1, sec. 21. The constitution of West Virginia adds to words spoken in debate, "or on any report, motion or proposition made in either house." Art. 6, sec. 17. Statutory provisions to the same effect are found in the Nebraska Code of Civil Procedure, pt. 1, ch. 48, sec. 4, and in the Texas Penal Code, art. 641. Among the privileged communications specified in the civil codes of California, North Dakota and South Dakota, are those made in legislative proceedings. Cal., sec. 47, par. 2; N. D., sec. 2530, par. 2; S. D., sec. 2530, par. 2; also in Oklahoma, Stats. of 1893, ch. 60, sec. 22, par. 2.

[17]Kilbourn *v.* Thompson (1880) 103 U. S. 168.

[18]Kilbourn *v.* Thompson *supra;* Coffin *v.* Coffin (1808) 4 Mass. 1.

[19]4 Mass. 1. In this case it appeared that a member of the Massachusetts House of Representatives obtained leave to lay on the table a resolution authorizing the appointment of an additional notary public for Nantucket. Thereupon the defendant, another member, asked where the proposer obtained his information of the facts stated, and met with the reply that the information came from a gentleman from Nantucket. The resolution was adopted, and the speaker had taken up some other business, when the defendant crossed the chamber to the place where the proposer was standing and asked him who the gentleman in question was. The proposer pointed to the plaintiff, who was sitting outside the bar; whereupon the defendant exclaimed, "What, that convict!" The proposer asked the defendant what he meant. "Don't you know the business of the Nantucket Bank?" asked the defendant. "Yes," was the reply, "but he was honorably acquitted." The defendant then said, "That did not make him the less guilty." The House was not then proceeding to a choice of the additional notary, who was not selected until a subsequent session, and the plaintiff was not a candidate. Moreover, there was no evidence that the resolution laid on the table and passed, or the subject-matter of it, was afterwards called up for consideration. A verdict in favor of the plaintiff was unanimously sustained on the ground that the defendant was not acting at the time in his official capacity. "This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies," said the Supreme Court of the United States in Kilbourn *v.* Thompson (1880) 103 U. S. 168, where the immunity was applied to the proceedings of a congressional committee, although acting without authority. Concurring with the views of Chief Justice Parsons, the court held that "it would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting. In short, to things generally done in a session of the House by one of its members in relation to the business before it." See also Hinds' Precedents of the House of Representatives, § 2670 *et seq.* and § 1655.

the privilege of the House as an organized body as of each individual member composing it, who is entitled to the privilege even against the declared will of the House. It is not confined to speech or debate, but extends to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the legislative office, even though it be irregular and against the rules of the House. The legislature must be in session to enable a representative to claim the immunity, but it is not confined to acts within the House; if a member be out of the chamber, sitting in a committee, executing the commission of the House, he is within the immunity. But unless he was acting in his official capacity, a representative is entitled to no protection beyond that accorded to his fellow citizens. To consider every malicious slander uttered by a citizen who is a representative as within his privilege because it was uttered within the walls of the legislative chamber, although not uttered in the exercise of his office, would render the legislature a sanctuary for calumny.[20] Moreover, directly publication ceases to be limited to the use of members, the operation of the general law of libel begins;[21] and even the immunity in connection with publications authorized by Parliament is based upon statute, not upon the common law.[22]

[20]Coffin *v.* Coffin *supra.* There has been only one attempt made in England to hold a member of Parliament liable for defamation. In *Ex parte* Wason (1869) L. R. 4 Q. B. 573, the complainant made an affidavit before a magistrate charging Lord Russell and Lord Chelmsford with conspiring to deceive the House of Lords, and so to injure the complainant, in that they had agreed to make statements in the House which they knew to be false, for the purpose of preventing the consideration of charges made by the complainant against the Chief Baron of the Exchequer. In holding that no action would lie, Cockburn, C. J. said: "We ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal procedure with respect to anything they may do or say in the House." A similar attempt in Ireland was disposed of in the same way. Dillon *v.* Balfour (1887) 20 L. R. Ir. 600.

[21]Rex *v.* Abingdon (1795) 1 Esp. 226; Rex *v.* Creevey (1813) 1 M. & S. 272. A speech made in Parliament for the purpose of attacking the character of a person, which is afterwards published elsewhere with a like purpose and effect, admits of no immunity; it would be otherwise, however, if it were published by a member in good faith for the information of his constituents. Wason *v.* Walter (1868) L. R. 4 Q. B. 73, 95; Davison *v.* Duncan (1857) 7 E. & B. 229, 233.

[22]Stockdale *v.* Hansard (1839) 9 A. & E. 1. As to publication outside its walls, by order of Parliament, of documents the circulation of which is absolutely protected so long as it takes place within its walls the same reasons for immunity do not apply, as decided above after a bitter conflict between the legislature and the courts. The legislature, being masters of the situation, made their will prevail by passing the Parliamentary Papers Act, 1840, which confers absolute immunity on the publication of certain parliamentary papers, printed by its order or under its authority, but not otherwise. 3 & 4 Vict., c. 9, ss. 1, 2.

Absolute immunity is confined to members of Congress and of the state legislatures. The public policy which requires the utmost freedom of action in the conduct of these independent departments of government does not apply to inferior bodies exercising certain legislative functions, such as city councils, boards of supervisors, etc.[23] Members of such bodies are sufficiently protected by their exemption from liability in the exercise of good faith.[24]

The immunity of witnesses appearing before legislative committees is the same as that of witnesses in courts of justice.[25] This rule has been adopted notwithstanding the fact that legislative committees are frequently composed of persons who have no

[23]Greenwood *v.* Cobbey (1889) 26 Neb. 449 (words spoken by a mayor in the city council charging unfitness of the city attorney): "In the absence of authority in cases like that under consideration, we deem the better rule to be that communications of the kind indicated are privileged when made *bona fide*"; Burch *v.* Bernard (1809) 107 Minn. 210 (words spoken by a member of a city council concerning an account presented for payment). See also Weber *v.* Lane (1903) 99 Mo. App. 69; Mauk *v.* Brundage (1903) 68 Oh. St. 89; Callahan *v.* Ingram (1894) 122 Mo. 355; Royal Aquarium *v.* Parkinson [1892] 1 Q. B. 431; Pittard *v.* Oliver [1891] 1 Q. B. 474. The proceedings at town meetings are in the same category. Bradford *v.* Clark (1897) 90 Me. 298; Bradley *v.* Heath (Mass. 1831) 12 Pick. 163; Smith *v.* Higgins (Mass. 1860) 16 Gray 251; Henry *v.* Moberly (1892) 6 Ind. App. 490.

This is obviously the safe rule, but there is some authority in favor of a broader application. In Wachsmuth *v.* Merchants National Bank (1893) 96 Mich. 426, an alderman offered a resolution in a city council setting forth that a judgment for a large sum had been affirmed against the president of a bank who was the principal surety of that bank on its bond as depository of the city money, and requiring that the city money be withdrawn from the bank. The bank brought an action for libel, and *capias* issued. On a subsequent action by him against the bank for false imprisonment, in which he recovered, it was held that the order of the court commissioner holding to bail was void because the affidavit upon which the order was granted expressly negatived liability. "The affidavit disclosed that the resolution was offered by plaintiff as a member of the common council of that body, and related to a matter in the line of plaintiff's duty as a public officer. In other words, the affidavit, upon its face, showed that the resolution charged as libelous was, as a matter of law, absolutely privileged." The court offered no discussion of the principle and cited no authorities. Relying solely upon the authority of this case, it was subsequently held in Trebilcock *v.* Anderson (1898) 117 Mich. 39, that a communication from the mayor of a city to the common council advising them of his reasons for vetoing a resolution passed by them, was absolutely privileged so far as the matter contained therein was pertinent to the subject. In McGaw *v.* Hamilton (1898) 184 Pa. St. 108, the court apparently assumes that the doctrine of absolute immunity applies to members of borough councils.

[24]But defamatory remarks volunteered by a member of a city council when no motion or other business was pending, are not even conditionally privileged. Callaghan *v.* Ingram (1894) 122 Mo. 355. See McGaw *v.* Hamilton (1898) 184 Pa. St. 108.

[25]Wright *v.* Lothrop (1889) 149 Mass. 385; Sheppard *v.* Bryant (1906) 191 Mass. 591; Terry *v.* Fellows (1869) 21 La. Ann. 375; Goffin *v.* Donnelly (1891) L. R. 6 Q. B. D. 307. But see Belo *v.* Wren (1884) 63 Tex. 686, for the case of an irregular committee.

knowledge of law, especially of rules of evidence; that frequently neither public nor private interests are represented by counsel, and that the proceedings are often very loosely conducted. The reason of the rule is as applicable in one case as in the other.

Petitions are almost as old as representative government; for a long time they formed the basis of legislation. Since legislation by bill superseded legislation by petition, the practice of petitioning has, however, enjoyed only sporadic popularity.[26] In this country the right of petition has been almost uniformly embodied in the fundamental law; in every State except Minnesota and Virginia the constitution declares that the people have a right to petition the legislature for redress of grievances. Absolute immunity was applied in the reign of Charles II in a case where a petition had been presented to a committee of Parliament, "because it is in a summary course of justice";[27] in other words the proceeding was judicial, and complaint was made to Parliament as the high court of justice.[28] The few cases in which the English rule has been followed in this country are without the existence of the reason which made it applicable there.[29] Giving the constitutional provision the widest

[26]In the seventeenth century the practice was revived, and during the civil war petitions became so numerous and troublesome that in 1661 their presentation was regulated by statute. 13 Chas. II, c. 65. This act was used against the Chartists in 1848. After the Revolution petitioning was regulated by orders of the House. Rules and Orders, 155-160.

[27]Lake *v.* King (1680) 1 Saund. 131. See also Kane *v.* Mulvany Ir. R. 2 C. L. 402.

[28]In Proctor *v.* Webster (1885) L. R. 16 Q. B. D. 112, where a letter to the Privy Council touching the conduct of one of its officers was denied absolute protection, the court points out that in Lake *v.* King *supra,* and Hare *v.* Meller (1588) 3 Leon. 138, 163, the proceedings were judicial. Hare *v.* Meller was an action for exhibiting to the Queen a bill against the plaintiff charging him with having received money from the defendant by perjury. "It was said by the court that the exhibiting of the bill to the Queen is not in itself any cause of action; for the Queen is the head and fountain of justice, and therefore it is lawful for all her subjects to resort to her to make their complaints. The jurisdiction of the Court of Chancery was not then clearly defined and petitions for relief in equity were addressed to the sovereign generally."

[29]In an early case, Harris *v.* Huntington (Vt. 1802) 2 Tyler 129 (a petition protesting against the reappointment of a justice of the peace) it was held, following Lake *v.* King *supra,* that absolute immunity from responsibility is indispensable to the right of petition, "for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it." This seems to be the only American case in which the point was actually decided. The case of Reid *v.* Delorme (S. C. 1806) 2 Brev. 76, where the petition concerned the failure of the Attorney-General to prosecute an action, is not clear. Although judgment for the plaintiff was arrested on the ground that the action could not legally be supported, the judgment is based upon considerations which apply to cases of conditional immunity only. In Cook *v.* Hill (N. Y. 1849) 3 Sandf. 341, concerning a memorial to the Postmaster-

scope, as embodying an important civil as well as political right, it is by no means apparent that there are any sufficient reasons why there should be absolute immunity in its exercise. On the other hand, having regard to the fact that in modern times the only practical sphere of petitioning concerns the removal of public officers for misconduct, common fairness demands that such an unrestricted method of attack should be limited to good faith. Although public officers should be amenable to every species of fair inquiry, no consideration of public policy requires that they should be helplessly exposed to the shafts of malice and calumny. For petitions against public officers, unlike judicial proceedings, may never afford the accused an opportunity to vindicate his reputation by a public trial, while the public record of a calumny remains. And if the public interest is promoted by affording the legislature every possible facility in securing information concerning public officers, it must certainly be at variance with that interest to expose the legislature to deception by calumny.[30]

At all events, petitions, applications, memorials or remonstrances addressed to subordinate legislative[31] or other official bodies,[32] and in general, those addressed to all executive or administrative officers whatsoever,[33] are privileged only if made in good faith. Under modern statutory provisions, however, clothing governors, mayors and other executive officers with jurisdiction to try subordinates

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General, the court seems to have thought that the doctrine applied to "applications, memorials and similar matters presented to the legislature or growing out of legislative proceedings." But attention is called to the fact that absolute privilege in legislative proceedings originated in England in the fact that Parliament was the high court of justice, and was applied in this country without the existence of the reason which induced it there. The statement in Com. *v.* Clap (1808) 4 Mass. 183, points to the conditional nature of the immunity.

[30]See the reasoning of Tilghman, C. J. in Gray *v.* Pentland (Pa. 1815) 2 S. & R. 22, and of Kent, C. J. in Thorn *v.* Blanchard (N. Y. 1809) 5 Johns. 508.

[31]Kent *v.* Bongartz (1885) 15 R. I. 72 (petition to a common council for the removal of a constable).

[32]Thorn *v.* Blanchard (N. Y. 1809) 5 Johns. 508 (petition to the council of appointment for the removal of a district attorney); Proctor *v.* Webster (1885) L. R. 16 Q. B. D. 112 (a letter of complaint to the Privy Council concerning one of its officers).

[33]Cook *v.* Hill (N. Y. 1849) 3 Sandf. 341 (a memorial addressed to the Postmaster-General by a bidder for a public contract); White *v.* Nicholls (1845) 3 How. 266 (a petition to the President and the Secretary of the Treasury for the removal of the collector of a port); Woods *v.* Wiman (1890) 122 N. Y. 445 (information given to the governor of a State for the purpose of influencing his action on a bill which had passed the legislature); Gray *v.* Pentland (Pa. 1815) 2 S. & R. 22 (accusation preferred to the governor against a public officer); see also Coogler *v.* Rhodes (1896) 38 Fla. 240; Ramsey *v.* Cheek (1891) 109 N. C. 270.

on charges presented with particular formalities, providing for an opportunity to be heard in public, and requiring a formal decision within a specified period, it is probable that the proceeding would be held to carry the same absolute protection that applies to judicial proceedings.[34]

II. Executive Proceedings.

A secretary, minister or officer of state is absolutely protected against civil actions for defamatory statements made in the discharge of his official duty.[35] The same general considerations of public policy and convenience which require that judicial officers should not be amenable to civil action for their judicial acts, apply to a large extent to official communications made by heads of executive departments in the discharge of duties imposed upon them by law. The interests of the State demand that such high executive officers, while exercising the functions of their office within the limits of their authority, should not be under any apprehension that the motives which control their official conduct may become

[34]It is only upon such grounds that the judgment in Larkin *v.* Noonan (1865) 19 Wis. 93, can be sustained. There a petition to the governor requesting the removal of a sheriff for malversation in office was held to be absolutely protected. "Our constitution provides that the governor may remove a sheriff upon giving him a copy of the charges against him and an opportunity of being heard in his defense. It is obvious that these provisions clothe the governor with a power over the proceeding strictly analogous to that exercised by a court in the trial of a cause. * * * And there would therefore seem to be the same grounds of public policy for saying that all matters that are contained in the petition which are material and pertinent to the subject of inquiry should be privileged, that there is for holding that what takes place in the ordinary course of justice is absolutely exempt from an action for libel." This case was apparently followed in Fisk *v.* Soniat (1881) 33 La. Ann. 1400, which involved charges by a police jury against a parish attorney; it is stated however that the charges were made in good faith. In Howard *v.* Thompson (N. Y. 1839) 21 Wend. 319, where charges had been made to the Secretary of the Treasury against a customs inspector, it was held that the plaintiff must prove want of probable cause as well as malice.

[35]Spalding *v.* Vilas (1895) 161 U. S. 483 (act of the Postmaster-General, in issuing cheques pursuant to statutory authority, calling attention to the fact that persons interested were by the terms of the Act under the legal obligation to respect any transfer of salary. De Arnaud *v.* Ainsworth (1904) 24 App. D. C. 167 (a report by the chief of the record and pension office of the War Department to the Secretary of War, made pursuant to departmental regulations, and as the result of an application for a medal of honor for distinguished services, wherein the applicant was charged with fraud); Chatterton *v.* Secretary of State for India [1895] 2 Q. B. 189 (a statement made by the Secretary of State for India to the Parliamentary Under-Secretary for India to enable him to answer a question asked in the House with regard to the treatment of the plaintiff); Grant *v.* Secretary of State for India (1877) 2 C. P. D. 445 (publication in the Indian Gazette of an order for the retirement of an officer, pursuant to governmental orders and regulations).

the subject of inquiry in a civil action for damages.[36] In a leading American case, in which the report of the chief of a bureau of the war department to the Secretary of War was held to be within the rule, it was said that it is not so much the particular position of the party making the report that establishes the immunity, as the occasion of making it, and the applicability of the public policy upon which immunity is based.

"Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior, when such report or communication is made in the course and discharge of official duty. Otherwise the perfect freedom which ought to exist in the discharge of public duty might be seriously restrained, and often to the detriment of the public service." [37]

If this case intended to formulate a general rule beyond the particular issue involved, it is not sustained by authority. Absolute immunity is confined to official communications from the heads of departments, in which the head of the department speaks for the government or as its mouthpiece. It has not been extended to inferior officers.[38]

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[36]Spalding *v.* Vilas *supra.* But in Grant *v.* Secretary of State for India *supra,* Grove, J. states the immunity subject to the qualification, "at all events, when such so-called libel is not alleged to have been published maliciously, and without reasonable and probable cause." However, it was there held that "the Commander in Chief could not be sued for libel for an act done in the course of his military duty, the Secretary of State is not liable for the publication of an act done in respect to a military officer in pursuance of governmental orders and regulations applying to military service.

[37]De Arnaud *v.* Ainsworth *supra.*

[38]Ranson *v.* West (1907) 125 Ky. 457 (a report by a school trustee to the county superintendent of schools on official business); *In re* Investigating Commission (1887) 16 R. I. 75 (committee appointed by a governor to investigate a state board of charities); Weber *v.* Lane (1903) 99 Mo. App. 69 (committee of a board of aldermen appointed to investigate charges against a dramshop keeper); Howland *v.* Flood 160 Mass. 509 (an investigating committee appointed by a town); Walker *v.* Best (N. Y. 1905) 107 App. Div. 304, and Barry *v.* McCollom (1908) 81 Conn. 293 (report of a superintendent of schools concerning the qualifications of a teacher. In Hemmens *v.* Nelson (1893) 138 N. Y. 517, involving statements made by the principal and executive head of a state deaf-mute institute to the executive committee and president of the board of trustees, to the effect that the superintendent of the sewing department had sent to the principal's wife an obscene publication, the court said: "I shall assume that it [absolute immunity] does not apply to the case, though it would perhaps be difficult to make a satisfactory distinction, founded upon principle, between the case of defamatory words in a petition to a legislative body or committee, or the reports of military officers, and the character of the charge in this case, and the circumstances under which it was made." See also, Eames *v.* Whitaker (1877) 123 Mass. 342; Smith *v.* Higgins (Mass. 1860) 16 Gray 251; Bradley *v.* Heath (Mass. 1831) 12 Pick. 163; Pearce *v.* Brower (1884) 72

The rule also applies in England to statements and reports made by military and naval officers in the performance of their duties and in relation to their service. Radical difference of opinion among the judges, however, has thrown much doubt upon the law, and the only rule that can be stated with certainty is that, in a court of first instance at all events, it must be taken to be English law that the civil courts of common law can take no cognizance of purely military or naval matters.[39] So far as defamation is concerned, the doctrine rests upon the case of *Dawkins* v. *Paulet*,[40] where an army officer had forwarded to his superior officer certain letters written to him by a subordinate, together with a report which contained language defamatory of such subordinate. It was held, on demurrer, by a divided court, that the civil courts had no jurisdiction over the matter. Although this was the ground upon which two judges, constituting a majority of the court, agreed, one of the majority judges based his conclusion upon two other grounds, while Chief Justice Cockburn dissented upon all grounds.[41]

Ga. 243; Rausch *v.* Anderson (1897) 75 Ill. App. 526; Haight *v.* Cornell (1842) 15 Conn. 74; Stevenson *v.* Ward (N. Y. 1900) 48 App. Div. 291; Lent *v.* Underhill (N. Y. 1900) 54 App. Div. 609.

Some confusing legislative enactments are not believed to be designed to change this rule. The California Civil Code, sec. 47, par. 1, includes among privileged publications those made "in the proper discharge of an official duty." The qualification "proper" is apparently used as the equivalent of *bona fide*. The next paragraph of the code enumerates publications "in any legislative or judicial proceeding, or in any other official proceeding authorized by law." While this paragraph has been construed to confer absolute immunity, Ball *v.* Rawles (1892) 93 Cal. 222, it is not plain what official proceedings are designed to be covered. The same provisions are found in the Codes of North Dakota, South Dakota and Oklahoma. In the Georgia Civil Code, sec. 2980, par. 1, the rule is clearly applied to "statements made *bona fide* in the performance of a public duty."

[39]Sutton *v.* Johnstone (1786) 1 T. R. 493; Dawkins *v.* Rokeby (1866) 4 F. & F. 806; Dawkins *v.* Paulet (1869) L. R. 5 Q. B. 94.

[40](1869) L. R. 5 Q. B. 94.

[41]Mellor and Lush, JJ. Sec. 12 of the articles of war provided: "That if any officer shall think himself wronged by his commanding officer, and shall upon due application made to him, not receive the redress to which he may consider himself entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our Secretary of State for War to make his report to us thereupon in order to receive our further direction." And this provision was applicable to all officers. "It would seem to follow," said Lush, J., "from the provisions thus made by the articles of war for a special mode of redress for every officer who may think himself aggrieved by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army must follow the special mode of redress pointed out in the articles of war, and that in respect of any grievances or complaint arising out of such administration he can have no

In this country, also, the rule with respect to military and naval officers is uncertain. In the two leading American cases concerning civil officers of state, although naturally no reference is made to the question of civil jurisdiction of military affairs, the reasoning of Mellor, J., on other grounds in *Dawkins* v. *Paulet* is quoted

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redress in any other way." The learned judge added two other reasons for his conclusion. He said, in the first place: "I apprehend that the motives under which a man acts in doing a duty which it is incumbent on him to do cannot make the doing of that duty actionable, however malicious they may be. I think the law regards the doing of the duty, and not the motives from or under which it is done." In the next place, he likened the case to judicial proceedings, and based the immunity of the defendant upon the highest grounds of policy and convenience: "No judge, nor juryman, nor witness, he [the Attorney-General] said, could discharge his duty freely, if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him, and to all officers in the same position; and there is, I think, little doubt that the reasons which justify the immunity in the one case, do in great measure extend to the other. How can a commander communicate his real opinions to the adjutant-general as to the conduct and qualifications or fitness for particular duty of any officer under his command. if his opinion be prejudicial to such officer, under the dread of an action for libel, or other action which, if he were not protected, might be brought against him by any dissatisfied subordinate officer who might consider himself aggrieved. To this it may be answered that no action would lie, as his communication would be privileged, if made *bona fide* and without malice. On the other hand, it must be observed that, although his communication might be privileged under such circumstances, still cases might frequently occur in which a judge on a trial at law would have to submit to a jury the most difficult questions of military discipline. * * * The promotion of an incompetent man may cause the greatest disaster, and yet, if the person who has to make his report as to the fitness or unfitness of such an officer is to do it under the idea that the opinion he expresses may be overruled by a jury ignorant of such matters, how can he be expected to do it freely?" Lush, J., who concurred with Mellor, J. in the judgment, expressed the view that the question was one of purely military cognizance, since the defamatory utterance complained of reflected on the plaintiff in his capacity of military officer alone. Cockburn, C. J. dissented in an elaborate opinion. To support the demurrer, he said, it was necessary to "maintain that in all matters relating to military authority and discipline a subordinate officer is, so far as civil redress is concerned, entirely at the mercy of his superior. * * * While I fully agree that acts done in the honest exercise of military authority are entirely privileged, I confess that I am not prepared to arrive at a conclusion so startling and apparently so unjust as that." He did not think it would be destructive of military discipline to submit questions of malicious oppression to a jury, and denied that as a matter of public policy absolute immunity ought to be allowed as in the case of participants in the administration of justice. With respect to the question of civil jurisdiction, he said: "It is undoubtedly true that a man on entering the army or navy subjects himself to military law, and whenever that law conflicts with the civil law applicable to the ordinary subject, he must be content to forego the rights which the ordinary law affords. And if by any provision of the military code, a party subjected to its authority were prohibited from resorting to civil tribunals for the redress of a wrong inflicted under color of military authority, there would be an end of the question. But no such prohibition exists."

There was no appeal in this case, but the same plaintiff subsequently brought another action of defamation against a witness in a court of in-

with approval;[42] but the only case in this country upon the issue involved in *Dawkins* v. *Paulet* expressly repudiates the prevailing English view, and adopts the reasoning of the dissenting judge in that case. The defamatory utterance was made in the line of duty, and that, said the court, "only clothes it with a privilege that is qualified." [43]

Some courts have granted immunity, not by recognizing a plea of substantive law, but by declaring a privilege of testimonial secrecy, thus defeating the action indirectly by suppressing the means of proof. The tortious and the testimonial privilege should, however, be carefully distinguished.

A genuine testimonial privilege exists for the protection of public officers in withholding certain kinds of facts or communica-

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quiry. Blackburn, J. rejected evidence of the defamatory statements on grounds of public policy, and held, moreover, that the action would not lie by reason of the fact that the statements had been made in the course of a judicial inquiry. On appeal to the Exchequer Chamber this judgment was affirmed, and a third ground of dismissal was mentioned, namely, that "questions of military discipline and military duty alone are cognizable only by a military court, and not by a court of law." Dawkins *v.* Rokeby (1873) L. R. 8 Q. B. 255. But, after referring to "the eloquent and powerful reasoning of Cockburn, C. J., in Dawkins *v.* Lord F. Paulet," the court expressed its satisfaction that this question "is yet open to final consideration before a court of last resort." In the House of Lords, however, the appeal was dismissed on the sole ground that the publication, being made in the course and for the purpose of a judicial inquiry, was subject to absolute immunity. (1875) L. R. 7. H. L. 744.

[42]Spalding *v.* Vilas (1895) 161 U. S. 483; De Arnaud *v.* Ainsworth (1904) 24 App. D. C. 167.

[43]Maurice *v.* Worden (1880) 54 Md. 233, where the action was for defamatory statements made by the superintendent of the naval academy in his endorsement, required by law, upon the resignation of a professor in the academy. Miller, J. dissented, adopting the view of the majority in Dawkins *v.* Paulet: "In both countries the army and navy are governed by substantially the same laws, rules and regulations, and the same evils, confusion and mischief will result here as there from withholding the protection which the English courts have thrown over such communications. Those who seek and obtain positions and appointments in such service do so with a full knowledge of the rules and regulations to which they are to be subjected. These differ widely from the ordinary laws to which other citizens are subjected, but are such that long experience has demonstrated to be essential to the usefulness and efficiency, if not to the very existence of the service itself. If a subordinate in such service suffers wrong and injustice from his superior while acting in the discharge of his duty, he can seek the redress which these rules and regulations have amply provided for the vindication of his character and honor, and the punishment of the wrongdoer." It is curious that Chief Justice Alvey, who delivered the opinion of the Court of Appeals of the District of Columbia in De Arnaud *v.* Ainsworth, makes no reference therein to the judgment in Maurice *v.* Worden, in which he participated as a justice of the Supreme Court of Maryland.

In Hemmens *v.* Nelson (1893) 138 N. Y. 517, it is asserted, *obiter*, that absolute immunity applies to words spoken by "military officers in reports or statements to their superiors, and all acts of state."

tions received in the course of official duty.[44] But the scope of this privilege has not been defined. So far as the rule is based upon the policy of protecting an official against liability in the performance of his duty it signifies nothing for the law of evidence; if the substantive law affords no protection, it is idle to allow testimonial secrecy.[45] With respect to secrets of state, in the military[46] or international[47] sense, the rule is well founded; but there is no good ground for the doctrine that matters of fact in the possession of officials, concerning solely the internal affairs of public business, ought to be privileged from disclosure when material in a court of justice.[48] The rule has been applied, however, in actions against officials for defamatory reports and other communications, thereby conferring immunity by refusing the means of proof.[49] Another genuine testimonial privilege exists with respect to a communication made to official prosecutors by informers.

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[44] "There is a class of communications which the court will not require to be produced in evidence, where those having the custody of them object to their publicity on the ground of public policy. * * * And where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same in effect, namely, receiving secondary evidence of their contents." Maurice *v.* Worden (1880) 54 Md. 233.

[45] In Schultz *v.* Strauss (1906) 127 Wis. 325, for instance, where the defendant was sustained in refusing to disclose, on interrogatories by the plaintiff, his testimony before the grand jury and to the district attorney, so that the plaintiff might frame an action for defamation, the ruling is properly based on grounds of substantive law.

[46] Totten *v.* U. S. (1875) 92 U. S. 105 (contract for service as a spy during war).

[47] Aaron Burr's Trial, where the correspondence desired might have involved complications with France and Spain.

[48] See Wigmore, Evidence, Ch. 83, State secrets and official documents.

[49] Gardner *v.* Anderson (1876) 9 Fed. Cas. No. 5220 (official letter from an appraiser to the Secretary of the Treasury); U. S. *v.* Cooper (1800) Wharton's State Trials 659 (official documents); Home *v.* Bentinck (1820) 2 B. & B 130 (minutes of a court of inquiry); Beatson *v.* Skene (1860) 5 H. & N. 838 (letters to Secretary of War and minutes of a court of inquiry); Dawkins *v.* Rokeby (1873) L. R. 8 Q. B. 255 (proceedings of a court of inquiry); Hennessy *v.* Wright L. R. (1888) 21 Q. B. D. 509 (dispatches between the Governor and Secretary of State); Chatterton *v.* Secretary of State for India [1895] 2 Q. B. 189 (notice of removal of an official from the pension list); M'Elveney *v.* Connellan (1864) 17 Ir. C. L. 55 (report of inspector-general of prisons to the Lord Lieutenant of Ireland); Gugy *v.* Maguire (1863) 13 Low Can. 33 (communication to the government by a police superintendent); Stace *v.* Griffith (1869) L. R. 2 P. C. 420 (letter to the Colonial Secretary of St. Helena).

The rule has been embodied in the statutes of several States, of which the California statute is typical: "A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure."

Another genuine testimonial privilege exists with respect to a communication made to official prosecutors by informers.

"It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against the laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known to the absolute discretion of the government, to be exercised according to its view of what the interest of the public requires. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government." [50]

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[50]Worthington *v.* Scribner (1872) 109 Mass. 487. Vogel *v.* Gruaz (1883) 110 U. S. 311; Schultz *v.* Strauss (1906) 127 Wis. 325; R. *v.* Watson (1817) 2 Stark. 116, and Bradley *v.* McIntoch (1903) 5 Ont. 227, are to the same effect. See also, Howard *v.* Thompson (N. Y. 1839) 21 Wend. 319, and Shinglemeyer *v.* Wright (1900) 124 Mich. 230. Wigmore, Evidence § 2374, points out some inherent limitations of this privilege, which have not always been observed. To the foregoing must be added the privilege of the House of Representatives and the House of Commons to refuse to disclose their proceedings. Hinds' Precedents of the House of Representatives, § 2659 *et seq.;* Commons Journal, vol. 73, p. 389; Chubb *v.* Salomons (1852) 3 C. & K. 75; Plunkett *v.* Cobbett (1804) 5 Esp. 136.